United Nations A/CN.4/584

General Assembly

Distr.: General
15 May 2007
English
Original: French

International Law Commission
Fifty-ninth session
Geneva, 7 May-8 June and 9 July-10 August 2007

Twelfth report on reservations to treaties*

By Mr. Alain Pellet, Special Rapporteur

Contents

		Paragraphs	Page
	Introduction	1–57	A/CN.4/574
I.	Formulation and withdrawal of acceptances and objections (*continued*)		A/CN.4/574
	A. Formulation and withdrawal of objections	58–180	A/CN.4/574
	B. Procedure for acceptances of reservations	181–275	2
	1. Express or tacit acceptance of reservations	186–224	3
	2. Form and procedure for express acceptances of reservations	225–239	16
	3. Acceptance of reservations to the constituent instrument of an international organization	240–270	21
	4. Irreversibility of acceptances of reservations	271–275	31

* For technical reasons, this document is entitled "Twelfth report" and is being issued as a separate document; in fact it constitutes the second part of the eleventh report (A/CN.4/574), from which it carries on, including in the numbering of the paragraphs and footnotes.

07-34410 (E) 250607 030707

B. Procedure for acceptances of reservations

181. According to the provisional general outline of this study,[302] the second section of part III (on the formulation and withdrawal of reservations, acceptances and objections) should deal with the formulation of acceptances of reservations and be structured as follows:

B. Formulation of acceptances of reservations

(a) Procedure regarding formulation of an acceptance (1969 and 1986, article 23, paragraphs 1 and 3);

(b) Implicit acceptance (1969 and 1986, article 20, paragraphs 1 and 5);

(c) Obligations and express acceptance (1969 and 1986, article 20, paragraphs 1, 2[303] and 3).[304]

182. Subject to transposing sections B (Formulation of acceptances of reservations) and C (Formulation of objections to reservations), the explanation for which was already given in the eighth report by the Special Rapporteur,[305] the following should be noted with respect to this framework:

(a) First, unlike the case of reservations and objections and following the example of articles 22 and 23, paragraph 4, of the Vienna Conventions,[306] it does not mention the withdrawal of acceptances, which appear to be considered as irreversible;[307]

(b) Secondly, it should be noted that only questions relating to the form and procedure for the formulation of acceptances of reservations will be addressed; in accordance with the provisional outline,[308] difficulties relating to their effects will be covered in subsequent chapters. The focus at this stage should be on how and under what procedural conditions a State or international organization may expressly accept a reservation by leaving open the question of whether and under which circumstances such an express acceptance is necessary for the sake of "establishing" the reservation (within the meaning of the chapeau of article 21, paragraph 1, of the Vienna Conventions).

183. As in the case of objections, each of the questions dealt with in this section will be presented in the following manner:

---

[302] A/CN.4/477, para. 37. See also A/CN.4/526, para. 18.

[303] The reference to paragraph 2 of article 20 is obviously erroneous: In no way does this provision either specify or imply that the acceptance of a reservation to a limited treaty must be express. See paras. 221-224 below.

[304] The parenthetical references relate to the relevant provisions of the Vienna Convention on the Law of Treaties of 1969 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

[305] A/CN.4/535 and Add.1, para. 69.

[306] "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

[307] See paras. 271-275 below.

[308] See A/CN.4/477, para. 37, sections B and C of Part IV (Effects of reservations, acceptances and objections).

(a) To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

(b) Such provisions, which should be reproduced in the Guide to Practice, will then be supplemented on the basis of an in-depth study, as far as possible, of practice, jurisprudence and legal doctrine;

(c) This should result in draft guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have in practice.

184. Under the provisions of the Vienna Conventions of 1969 and 1986, save in exceptional cases, the acceptance of a reservation, which is not always necessary for a reservation to be established,[309] may be either express, tacit or implicit (sect. 1 below). It is assumed that the tacit (or implicit) acceptance results from silence on the part of contracting States or international organizations during a specific period or at a time when they should have objected; thus, no procedural difficulty is likely to arise, contrary to what occurs when the acceptance is express (sect. 2), including in the particular case of reservations to constituent instruments of international organizations (sect. 3). In every case, whether express or tacit, the acceptance of a reservation is irreversible (sect. 4).

1. Express or tacit acceptance of reservations

185. In accordance with paragraph 5 of article 20[310] of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986:

> For the purposes of paragraphs 2 and 4,[311] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

186. Acceptance of a reservation is therefore defined as the absence of an objection and occurs in principle when an objection is not raised under either of the two conditions specified by this provision: by the date of receipt of the notification of the reservation or the date of the expression of consent to be bound. In these two cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral statement. This

[309] See para. 188 below.

[310] This article is entitled "Acceptance of and objection to reservations". Unlike the English text, the French version of the two Vienna Conventions keeps the word "acceptance" in the singular but leaves "objections" in the plural. This distortion, which appeared in 1962 (see *Annuaire de la Commission du droit international, 1962*, vol. I, 663rd meeting, 18 June 1962, p. 248 and *Yearbook of the International Law Commission, 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223 (text adopted by the Drafting Committee); *Annuaire ... 1962*, vol. II, p. 196 and *Yearbook ... 1962*, vol. II, p. 176) was never corrected or explained.

[311] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and the constituent acts of international organizations.

does not mean, however, that acceptance is necessarily tacit: nothing prevents a State or an international organization from expressly formulating it, and such acceptance may be binding, which is implied by the phrase "unless the treaty otherwise provides" — even if it was inserted in this provision for other reasons[312] — and the omission, in paragraph 5, of any reference to paragraph 3 of article 20, which does indeed require a particular[313] form of acceptance.

187. It has been argued nevertheless that this division between formal acceptances and tacit acceptances of reservations disregards the necessary distinction between two forms of acceptance without a unilateral statement, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to "early" acceptance when the reservation is authorized by the treaty: "Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with Article 20 (1)."[314] None of these arguments, in the view of the Special Rapporteur, should be reflected in the Guide to Practice.

188. With respect to so-called "early" acceptances, the Commission's commentary on draft article 17 (current article 20) clearly indicates that:

> Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting States has been given in the treaty. No further acceptance of the reservation by them is therefore required.[315]

In fact, the silence of the other parties does not constitute a tacit acceptance: in the absence of a conflicting provision of the treaty, an acceptance is simply not a condition for a reservation to be established; it is established ipso facto by virtue of the treaty. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect, and of which, in any case, there is no example known to the Special Rapporteur. Therefore, it would not be useful to explore this possibility within the framework of the Guide to Practice.[316]

189. The same applies to the distinction made by some authors based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions between "tacit" and "implicit" acceptances, depending on whether or not the reservation has already been made at the time when the other interested party expresses its consent to be bound. In the former case, the acceptance would be implicit; in the latter, it would be tacit.[317] In the former case, States or international organizations are

---

[312] See below, para. 211.

[313] See below, paras. 240-270.

[314] D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 118. This article is perhaps the most thorough study of the rules which apply to the acceptance of reservations (see especially pp. 118-135 and 153).

[315] *Yearbook of the International Law Commission, 1966*, vol. II, p. 207, para. 18.

[316] The rule set out in article 20, paragraph 1, must be borne in mind; it would be more logical to do so, however, in the part of the Guide concerning the effects of acceptances of reservations.

[317] D. W. Greig, note 314 above, p. 120; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (T.M.C. Asser Institute, The Hague, 1988), pp. 125-126; Daniel Müller, Commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), p. 816, para. 35.

deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of 12 months to raise an objection, after which it is deemed to have accepted the reservation.

190. Although the result is the same in both cases — the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time — their grounds are different. With respect to States or international organizations which become contracting parties to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather the fact that this State or international organization, aware of the reservations formulated,[318] accedes to the treaty without objecting to the reservations. The acceptance is thus implied in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated.[319] With respect to States or international organizations which are already parties to a treaty when the reservation is formulated, however, the situation is different: It is their protracted silence — generally for a period of 12 months — or, in particular, the absence of any objection on their part which is considered as an acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

191. In fact, this doctrinal distinction is of little interest in practice and should probably not be reflected in the Guide to Practice. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of 12 months to raise an objection from those which, not yet being parties to the treaty at the time of the formulation of the reservation, have time for consideration until the date of expression of their consent to be bound by the treaty, which nevertheless does not prevent them from raising an objection before this date.[320] This is an issue of a time period, however, not of a definition.

192. Another question relates to the definition itself of tacit acceptances. It may well be asked whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof.

193. This paradoxical question stems from the wording of paragraph 4 (b) of article 20. The paragraph states:

> An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization.

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least concerning the entry into force of the treaty (and probably the "establishment" of the reservation itself).

---

[318] See below, para. 219.

[319] See D. Müller, footnote 317 above, p. 816, para. 36. See also draft article 10, paragraph 5, of Brierly, [First] Report on the law of treaties, A/CN.4/23, para. 100; for the English version see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

[320] See above, paras. 76-84.

194. This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations. It relates more to the part of the Guide to Practice which deals with these effects. At the present stage, it is probably sufficient to make reference to it in the commentary on draft guideline 2.8.1.[321]

195. In the light of these observations, for the purpose of defining and categorizing acceptances, it is probably sufficient to indicate in the heading of the section of the Guide to Practice on the formulation of objections:

> **2.8 Formulation of acceptances of reservations**
>
> The acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international organization on the part of the contracting State or contracting international organization.
>
> The absence of objections to the reservation may arise from a unilateral statement in this respect [(express acceptance)] or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13 [(tacit acceptance)].

Even if the bracketed comments may only be used in the commentaries on draft guideline 2.8, their inclusion in parentheses in the text itself would probably have the advantage of emphasizing the guideline's "definitional" role.

196. Draft guideline 2.8 limits the potential authors of an acceptance to contracting States and organizations alone. This is easily explained: article 20, paragraph 4, takes into consideration only acceptances made by a contracting State or contracting international organization, and article 20, paragraph 5, applies the presumption of acceptance only for States which are parties to the treaty. Thus, a State or an international organization which on the date when notice of the reservation is given is not yet a contracting party to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound, that is, the date when it definitively becomes a contracting State or contracting organization. It is a different matter, however, for the limited treaties referred to in paragraph 2 of article 20 of the Vienna Conventions[322] and constituent instruments of international organizations provided for in paragraph 3 of that article.[323]

197. Furthermore, in keeping with the purpose of section 2 of the Guide to Practice in which it is meant to appear, the definition of acceptances to reservations given in draft guideline 2.8 is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances. It arises from both the text of the Vienna Conventions and their *travaux préparatoires* and the practice that tacit acceptance is the rule and express acceptance the exception.

198. In the Advisory Opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had emphasized that the "very great allowance made to tacit assent to

---

[321] See below, paras. 205 and 206.

[322] See below, paras. 221-224.

[323] See below, paras. 240-270.

reservations"[324] characterized international practice which was becoming more flexible with respect to reservations to multilateral conventions. Although, traditionally, express acceptance alone had been considered as expressing consent by other contracting States to the reservation,[325] this solution, already outdated in 1951, no longer seemed practicable owing to, as the Court stated, "the very wide degree of participation" in some of these conventions.[326]

199. Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft of J. L. Brierly in 1950,[327] which asserted, to a limited degree,[328] the possibility of consent to reservations by tacit agreement,[329] H. Lauterpacht and G. G. Fitzmaurice have also allowed for the principle of tacit acceptance in their drafts.[330] This should come as no surprise. In the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance is bound to be included to avoid excessive periods of legal uncertainty: Owing to the lack of presumption in this respect, the protracted silence of a State party to a treaty could hinder the outcome of the reservation and challenge the status of the reserving State in relation to the treaty for an indefinite period.

200. In that light, although the principle of tacit consent does not meet the same requirements in the "flexible" system ultimately upheld by the fourth Special Rapporteur of the Commission on the law of treaties, it maintains some merits and advantages. In his first report, Sir Humphrey upheld the principle in the draft articles which he had submitted to the Commission.[331] He put forward the following explanation for doing so:

> It is ... true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled

---

[324] *I.C.J. Reports 1951*, p. 21.

[325] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 104. The author refers to the work of D. Kappeler, *Les reserves dans les traités internationaux* (Verlag für Recht und Gesellschaft, Berlin, 1958), pp. 40-41.

[326] *I.C.J. Reports 1951*, p. 21.

[327] *Yearbook of the International Law Commission, 1950*, vol. 1, fifty-third session, 23 June 1950, pp. 92-95, paras. 41 to 84. Mr. el-Khoury even went so far as to say that the mere silence of a State should not be regarded as implying an acceptance, but rather as a refusal to accept the reservation (ibid., p. 94, para. 67); this view remained, however, an isolated view.

[328] Brierly's draft article 10 in fact envisaged only cases of implicit acceptance, that is, cases where a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see Report on the law of treaties (A/CN.4/23), p. 48 [*Yearbook ... 1950*, vol. II, pp. 238-242].

[329] In fact, this was rather a matter of implicit acceptance; see para. 189 above.

[330] See the summary of the position of the Special Rapporteurs and of the Commission in Humphrey Waldock, First Report on the Law of Treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. 14.

[331] See draft article 18, paragraph 3, of his first report (ibid., pp. 69-70 and pp. 76-77, paras. 14-17); reprinted in draft article 19, para. 4, in his fourth report (A/CN.4/177, cited above in footnote 166, p. 53).

more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State ...[332]

201. The provision which would become the future article 20, paragraph 5, was ultimately adopted by the Commission without any discussion.[333] During the Vienna Conference of 1968-1969, article 20, paragraph 5, also raised no problem and was adopted with the inclusion of the almost useless[334] clarification "unless the treaty otherwise provides" as the only amendment.[335]

202. The work of the Commission concerning the law of treaties between States and international organizations or between international organizations has not greatly changed or challenged the principle of tacit consent. Nevertheless, the Commission had decided to assimilate international organizations with States concerning the issue of tacit acceptance.[336] Following criticism made by some States,[337] the Commission decided to "refrain[] from saying anything in article 20, paragraph 4, concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".[338] Draft article 20, paragraph 4, adopted by the Commission thus echoes article 20, paragraph 5, of the Vienna Convention of 1969 word for word.[339] During the Vienna Conference, assimilation between States and international organizations was nevertheless reintroduced on the basis of several amendments in this respect[340] and thorough discussions.[341]

---

[332] First report (A/CN.4/144), footnote 330 above, p. 67, para. 15.

[333] *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, pp. 283-284, paras. 43-53; see also P.-H. Imbert, footnote 325 above, p. 105.

[334] On the meaning of this part of the provision, see below, paras. 210-211.

[335] United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 136. Two other amendments which would have deleted the reference to paragraph 4 (Australia) (A/CONF.39/C.1/L.166, ibid., p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, ibid., p. 133) were either not adopted or withdrawn.

[336] See draft articles 20 and 20 bis adopted on first reading, *Yearbook of the International Law Commission, 1977*, vol. II, Part II, pp. 111-113.

[337] See *Yearbook of the International Law Commission, 1981*, vol. II, Part II, annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.1 (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur in his tenth report, *Yearbook of the International Law Commission, 1981*, vol. II, Part I (A/CN.4/341), p. 61, para. 75.

[338] See the commentary on draft article 20, *Yearbook of the International Law Commission, 1982*, vol. II, Part II, pp. 135-36, paras. 5 and 6.

[339] *Yearbook of the International Law Commission, 1982*, vol. II, Part II, p. 36.

[340] China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. II, Documents of the Conference* (A/CONF.129/16/Add.1), pp. 70-71, para. 70.

[341] See *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. I, Summary records of the plenary meetings of the Committee of the Whole* (A/CONF.129/16), 12th to 14th meetings, 27 and 28 February, 1986, pp. 104-114.

203. In line with the procedure followed in adopting draft guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), it seems that the Commission's Guide to Practice should include a draft guideline reflecting article 20, paragraph 5, of the 1986 Convention. This provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article which do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections.

204. This problem could easily be resolved by removing the reference to paragraphs 2 and 4 in paragraph 5. These provisions discuss cases in which unanimous acceptance is, and is not, required in order for the reservation to be established and this is a question of validity, not of procedure; these provisions are not, therefore, directly relevant to the question of the formulation (in the procedural sense of the word) of reservations, acceptances and objections, the only question that is relevant in the context of part III of the Guide to Practice. However, in order to remain true to the spirit of article 20 of the Vienna Conventions, it might be useful to specify that cases in which an express acceptance is required are excluded.

205. This clarification appears in square brackets in draft guideline 2.8.1 bis, which might be worded as follows:

2.8.1 bis Tacit acceptance of reservations

Unless the treaty otherwise provides [or, for some other reason, an express acceptance is required], a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

206. However, if the Commission decides to retain draft guideline 2.6.13 (Time period for formulating an objection),[342] the above wording, if adopted, would have the disadvantage of repeating draft guideline 2.6.13 almost word for word. Therefore, in order to avoid redundancies, draft guideline 2.8.1 could simply refer to draft guideline 2.6.13, as follows:

2.8.1 Tacit acceptance of reservations

[Unless the treaty otherwise provides, a] [A] reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation in accordance with guidelines 2.6.1 to 2.6.14.

207. In the opinion of the Special Rapporteur, this wording cannot be accused of departing from article 20, paragraph 5, of the Vienna Conventions, since it refers to draft guideline 2.6.13, which itself reproduces (from the angle of objections) article 20, paragraph 5. This wording also has a number of advantages. First, it prevents the Guide to Practice from including two provisions which, in reality, relate to the same issue (or two sides of the same coin) and are more or less identically worded. Furthermore, it emphasizes more clearly the dialectic between (tacit) acceptance and objection — objection excludes acceptance and vice versa.[343]

[342] See para. 128 above.

[343] See D. Müller, footnote 317 above, pp. 822-823, para. 49.

During the Vienna Conference of 1968, the French representative expressed this idea in the following terms:

> [A]cceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation.[344]

208. Admittedly, this idea is included in the wording of article 20, paragraph 5, of the Vienna Conventions which is reproduced in draft guideline 2.8.1 bis; however, by removing superfluous elements (most of them temporal in nature), this idea is brought out more clearly.

209. One could, however, question whether it is necessary to include in draft guideline 2.8.1 the phrase in square brackets ("Unless the treaty otherwise provides").

210. This does not really need to be spelled out, since all the provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide. The same must therefore be true, a fortiori, of the guidelines contained in the Guide to Practice.[345]

211. That said, the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention shed light on why this phrase was inserted. Indeed, this phrase ("unless the treaty otherwise provides") was included in response to an amendment proposed by the United States.[346] The United States representative to the Conference explained that an amendment had been proposed because

> [t]he Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months.[347]

The United States amendment was, therefore, aimed not at the principle of tacit assent as such, but rather at the period of 12 months established by the Commission.[348]

212. It therefore seems entirely justified to retain the phrase "unless the treaty otherwise provides" in draft guideline 2.6.13 (Time period for formulating an objection),[349] if only because it should depart as little as possible from the text of the Vienna Convention, which it reproduces almost word for word. Furthermore, it is draft guideline 2.6.13 that discusses the time period within which, and the moment at which, an objection can validly be formulated and the United States

---

[344] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 22nd meeting, 11 April 1968, p. 116, para. 14.

[345] For similar comments on the same issue, see, for example, A/CN.4/526/Add.2, para. 86, on draft guideline 2.5.1 ("Withdrawal of reservations"), which reproduces the provisions of article 22, paragraph 1, of the 1986 Vienna Convention.

[346] See footnote 335 above.

[347] *Summary records* (A/CONF.39/11), footnote 344 above, 21st meeting, 10 April 1968, p. 108, para. 13.

[348] José María Ruda argues, however, that the United States amendment emphasizes the "residual character of Article 20, paragraph 5" ("Reservations to Treaties", *Recueil des cours de l'Académie de droit international de la Haye (RCADI)*, vol. 146, 1975-III, p. 185).

[349] See para. 128 above.

introduced its amendment to article 20, paragraph 5, during the 1968-1969 Conference precisely in order to draw attention to the possibility of altering the 12-month period indicated therein.[350] It would not therefore seem useful to repeat this phrase in draft guideline 2.8.1, the purpose of which is to emphasize that the presumption of tacit acceptance in the absence of an objection is the general rule, as the reference to guideline 2.6.13 is a sufficient reminder that this presumption is not absolute. In any case, the provisions of the Vienna Convention and, in particular, the provisions relating to reservations may be modified and altered by States or international organizations that are parties to the treaty.

213. The 12-month period enshrined in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from — the fairly inhomogeneous — State practice at that time. The Special Rapporteur had found time periods of 90 days and of six months in treaty practice,[351] but preferred to follow the proposal of the Inter-American Council of Jurists.[352] In that regard, he noted the following:

> But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed.[353]

214. Even though article 20, paragraph 5, of the Vienna Conventions does not seem to be part of customary international law, at least with respect to the 12-month period within which an objection must be formulated in order to reverse the presumption of acceptance,[354] the fact remains that this provision does stipulate a 12-month period and, according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions. While the 12-month period did not emerge as a well established customary rule during the Vienna Conference and is still not one, perhaps, to this day, it is still "the most acceptable" period.[355] F. Horn noted the following in that regard:

> A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving state and the confronted parties. Nor should the period be too short. That again

---

[350] See para. 211 and footnote 347 above.

[351] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. 14.

[352] Ibid., p. 67, para. 16.

[353] Ibid.

[354] See D. Müller, footnote 317 above, p. 808, para. 16. See also Gorgio Gaja, "Unruly Treaty Reservations", in *Le Droit international à l'heure de sa codification: Études en l'honneur de Roberto Ago*, A. Giuffrè, Milan, 1987, p. 324; D. W. Greig, footnote 314 above, pp. 127 et seq.; Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 127.

[355] P.-H. Imbert, footnote 325 above, p. 107. D. W. Greig considers that the 12-month period established in article 20, paragraph 5, of the Vienna Convention is at least "a guide to what is reasonable" (footnote 314 above, p. 128).

would not leave enough time for the confronted states to undertake the necessary analysis of the possible effects a reservation may have for them.[356]

215. In fact, this time period — which clearly emerged from the progressive development of international law when the Vienna Convention was adopted — has never fully taken hold as a customary rule that is applicable in the absence of text. For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.[357] This is because in cases where the treaty was silent on the issue of reservations, the Secretary-General traditionally considered that, if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.[358] However, having decided that this practice delayed the entry into force of treaties and their registration,[359] the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.[360] In order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), can be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting Parties would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. The Secretary-General also recently stated that he was in favour of the 12-month period specified in paragraph 5, which now applies to the — necessarily unanimous — acceptance of late reservations.[361] Moreover, State practice shows that States formulate objections even if the 12-month period specified in article 20, paragraph 5, has ended.[362] Whatever uncertainties there may be regarding the "positive quality" of the rule with regard to general international law, the rule is retained by the Vienna Conventions and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more disadvantages than advantages.

216. The role of article 20, paragraph 5, is therefore twofold: on the one hand, it establishes the principle of tacit assent and the relationship between acceptance and

---

[356] Footnote 317 above, p. 126.

[357] P.-H. Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traites. Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *Annuaire Français de Droit International (A.F.D.I.)*, vol. XXVI, 1980, pp. 524-541; G. Gaja, footnote 354 above, pp. 323-324; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 245-250; D. Müller, footnote 317 above, pp. 821-822, para. 48.

[358] *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/8) (New York, 1997, United Nations publication, Sales No. E.94.V.15), p. 55, para. 185.

[359] The 90-day period continued to be applied, however, to the acceptance of late reservations for which unanimous acceptance by the contracting States is generally required (ibid., pp. 61-62, paras. 205-206).

[360] Ibid., pp. 54-55, paras. 184-187.

[361] Memorandum from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See the fifth report on reservations to treaties (A/CN.4/508/Add.4), para. 322. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publications, 1999), p. 102).

[362] See paras. 136-143 above.

objection and, on the other, it provides a time frame for the presumption of tacit acceptance. If a State does not object within a period of 12 months, it is presumed to have accepted the reservation. By the same token, article 20, paragraph 5, implicitly determines the time period within which an objection may be made.[363] Once this period ends, the State or international organization is considered to have accepted the reservation and can no longer validly object to it.[364]

217. Article 20, paragraph 5, can therefore be interpreted in two ways that are more complementary than opposing:

(a) On the one hand, it establishes a time limit for raising objections. From this perspective, the provision establishes the principle that it is impossible[365] for a State to raise objections after the end of the 12-month period[366] and, in this respect, seems to be no more than a simple provision relating to form applicable to the formulation of an objection.[367]

(b) On the other hand, it places a silent State, i.e. a State that has not raised any objections during the 12-month period, in the same situation as a State that has explicitly accepted the reservation. This acceptance, albeit tacit, produces the effects envisaged in article 20, paragraph 4 (a), and article 21, paragraph 1, of the Vienna Conventions, provided all the other conditions are met.

218. Sir Humphrey Waldock had noted the existence of these two approaches in treaty practice, but had hardly paid attention to the issue, simply stating that they "achieve the same result".[368] This is certainly true: in actual fact, they are two sides of the same coin, or two different ways of establishing concurrently that the objection constitutes the act that reverses the presumption of tacit consent and that,

---

[363] See also paras. 125-129 above.

[364] The Secretary-General, as depositary of multilateral treaties, accepts objections formulated after the end of the 12-month period or, where applicable, the time limit prescribed in the treaty, but transmits them only as "communications" (see *Summary of practice ...*, footnote 358 above, p. 63; see also Palitha T. B. Kohona, "Some notable developments in the practice of the UN Secretary-General as depository of multilateral treaties: reservations and declarations", *American Journal of International Law*, vol. 99, 2005, p. 433, or "Reservations: discussion of recent developments in the practice of the Secretary-General of the United Nations as depositary of multilateral treaties", *Georgia Journal of International and Comparative Law*, vol. 33, 2004-2005, p. 444.

[365] See, however, paras. 136-144 above and draft guideline 2.6.15 (Late objections).

[366] This seems to be the interpretation given by P.-H. Imbert, footnote 325 above, p. 151.

[367] This solution was explicitly retained in article 8, paragraph 2, of the Convention on the Nationality of Married Women of 1957, which states the following: "... Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect as between the State making the notification and the State making the reservation." Furthermore, an amendment proposed by Australia during the United Nations Conference on the Law of Treaties (A/CONF.39/C.1/166, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 136) and later withdrawn (*Summary records* (A/CONF.39/11), footnote 344 above, 25th meeting, 16 April 1968, p. 135, para. 34) chose a similar solution by establishing a time limit of six months.

[368] First Report on the Law of Treaties (A/CN.4/144), footnote 330 above, p. 67, para. 14.

in order to have this effect, it must be raised within certain time periods. This is very much the spirit of article 20, paragraph 5, of the Convention.[369]

219. The situation of States and international organizations that are not already "contracting parties" when the reservation is formulated is very different to the situation of those that are and corresponds to the second scenario envisaged in article 20, paragraph 5, of the Vienna Conventions. This difference is due to the fact that they have until the date on which they express their consent to be bound by the treaty to raise an objection to a reservation, even if this is later than the date on which the 12-month period ends. This specific rule already appeared in J. L. Brierly's proposals,[370] but was not taken up by either H. Lauterpacht or G. G. Fitzmaurice or, curiously, retained by the International Law Commission in the articles adopted on first reading in 1962,[371] even though Sir Humphrey had included it in the draft article 18 presented in his 1962 report.[372] In the end, following the comments made by the Australian Government, it was reintroduced during the second reading.[373]

220. Even though it would appear that States and international organizations that are not already parties to the treaty when the reservation is formulated do not enjoy a period of reflection, unlike States and international organizations that are already parties to the treaty when the reservation in question is formulated, they are in no way at a disadvantage. Moreover, the solution ultimately retained in article 20, paragraph 5, of the Vienna Conventions is fully justified by the need for legal certainty. Indeed, granting such States a new period of reflection beginning on the date on which they ratify or accede to the treaty would put the reserving State back in an intermediate and uncertain status vis-à-vis the treaty and this does not seem admissible from the point of view of legal certainty. Furthermore, reservations formulated by other States are communicated to States and international organizations that are "entitled to become parties to the treaty" in exactly the same way that they are communicated to States and international organizations that are already parties to the treaty.[374] As a result, they usually have more than 12 months to consider the reservation that has been formulated and can therefore react at least when they express their consent to be bound by the treaty, if not before.[375] In any case, the phrase "whichever is later [the end of the period of 12 months or the date on which it expressed its consent to be bound by the treaty]" ensures that States and international organizations have at least one year to consider reservations.

221. The time period relating to implicit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is, however, subject to an additional limitation when unanimous acceptance is required in order for the reservation to be established. A priori, article 20, paragraph 5, of the

---

[369] See paras. 125-144 above and paras. 272-274 below.

[370] See para. 199 and footnote 328 above.

[371] Indeed, draft article 19, paragraph 3, presented in the Report of the Commission to the General Assembly concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, p. 176.

[372] A/CN.4/144, footnote 330 above, pp. 61-62.

[373] Fourth report on the law of treaties (A/CN.4/177), footnote 331 above, p. 45 and p. 53, para. 17.

[374] See article 23, paragraph 1, of the Vienna Conventions. See also the first paragraph of draft guideline 2.1.5 (Communication of reservations) and its commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 79-93.

[375] See paras. 76-84 above.

Vienna Conventions does not seem to oppose the application of the general rule in this case. However, this provision explicitly refers to article 20, paragraph 2 (treaties with limited participation), which requires unanimity. It is only logical that allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation consented to the reservation and this would prevent unanimous acceptance, even if the said State had not formally objected to the reservation. The application of the presumption established in article 20, paragraph 5, would therefore have exactly the opposite effect to the one desired, i.e. the rapid stabilization of treaty relations and of the reserving State's status vis-à-vis the treaty.

222. This issue was addressed convincingly by Sir Humphrey Waldock in draft article 18 contained in his first report, which made a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (which are subject to the "flexible" system), on the one hand, and plurilateral treaties (which are subject to the traditional system of unanimity), on the other. Indeed, paragraph 3 (c) of this draft article provided the following:

> A State which acquires the right to become a party to a treaty after a reservation has already been formulated[376] shall be presumed to consent to the reservation:
>
> (i) in the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
>
> (ii) in the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.[377]

Sir Humphrey also noted, with reference to the scenario envisaged in paragraph 3 (c) (i) and in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty

> is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty.[378]

223. It follows that, wherever unanimity remains the rule, once a State or international organization accedes to the treaty, it may no longer validly object to a reservation that has already been unanimously accepted by the States and international organizations that are parties to the treaty. This does not mean, however, that the State or international organization loses its right to object to the

---

[376] "Made" would undoubtedly be more appropriate, since if the period within which an objection can be raised following the formulation of a reservation has not yet ended, there is no reason why the new contracting State could not object (see para. 217 above).

[377] *Yearbook ... 1962*, vol. II, p. 61.

[378] Ibid., p. 67, para. 16 of the commentary.

reservation. It may simply not do so after the end of the 12-month period. If it accedes to the treaty after this, it can only consent to the reservation.

224. This specific issue, which characterizes the acceptance of reservations for which unanimity remains the rule, might be reflected in the following guideline:

2.8.2 Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations

A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation.

2. Form and procedure for express acceptances of reservations

225. As stated by Professor Don Grieg, "the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit".[379] Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

226. The existence of the presumption of article 20, paragraph 5 of the Vienna Conventions in no way prevents States and international organizations from openly expressing their consent to reservations that have been made. This could appear arguable, at least in cases where a reservation does not satisfy the conditions of validity laid down in article 19 of the Vienna Conventions. The connection between a reservation's validity, on the one hand, and the possibility for States and international organizations to express, tacitly or openly, their consent to a reservation, on the other, does not require elucidation in the section of the Guide to Practice concerning procedure. Rather, it concerns the effects of reservations, acceptances and objections, which will be the subject of a later report. At this stage, it is sufficient to note in guideline 2.8.3:

2.8.3 Express acceptance of a reservation

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

227. Unlike reservations themselves as well as objections, express acceptances can of course be made at any time. This presents no obstacle for the reserving State, since a State or an international organization which does not expressly consent to a reservation would nevertheless be seen as having accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the Vienna Conventions, for which guideline 2.8.1 specifies the legal consequences. Even a State or an international organization which had raised a prior objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at

[379] D. W. Grieg, footnote 314 above, p. 120. In the same sense, see also F. Horn, footnote 317 above, p. 124; Liesbeth Lijnzaad, *Reservations to United Nations Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995), p. 46; R. Riquelme Cortado, footnote 357 above, pp. 211 ff; D. Müller, footnote 317 above, pp. 812 and 813, para. 27.

any later date.[380] This amounts to a complete withdrawal of the objection, one that has the same effect as an acceptance.[381]

228. In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. One finds only a few very isolated examples, and even some of these are not without problems of their own.

229. An example often cited in the literature[382] is the acceptance by the Federal Republic of Germany of a French reservation, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should nevertheless be noted that this reservation on the part of the French Republic had been made late, some 40 years after France's accession to that Convention. The German communication[383] clearly states that the Federal Republic "raises no objections" to it[384] and thus clearly constitutes an acceptance.[385] The text of the communication from the Federal Republic of Germany does not clarify whether it accepted the deposit of the reservation despite its late formulation,[386] the content of the reservation itself, or both.[387]

230. There are other, less ambiguous cases as well: for example, the declarations and communications of the United States in reaction to the reservations made by Bulgaria,[388] the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the 1954 Convention concerning Customs Facilities for Touring, in which it made clear that it had no objection to these reservations. The United States noted inter alia that it would apply the reservation reciprocally with respect to each of the States making reservations,[389] which, moreover, was its right

---

[380] See para. 152 above, and draft guideline 2.7.1.

[381] See paras. 158-160 above.

[382] F. Horn, footnote 317 above, p. 124; R. Riquelme Cortado, footnote 357 above, p. 212.

[383] This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) French reservation was "considered to have been accepted" by Germany on the basis of the principle of article 20, paragraph 5, of the Vienna Conventions. Furthermore, the Secretary-General had already considered the French reservation as having been accepted as of 11 May 1979, three months after its deposit.

[384] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/23), United Nations, New York, 2005, vol. II, pp. 581 and 582 (note 4) (chap. II, 11).

[385] In effect, provided that no objection has been raised, the State is considered to have accepted the reservation. See article 20, paragraph 5, of the Vienna Conventions, and para. 218 above.

[386] On this topic, see draft guideline 2.3.1 (Reservations formulated late) and its commentaries (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/56/10), pp. 477-489).

[387] The disadvantage of using the same terminology for both hypotheses was pointed out in the commentary to draft guideline 2.6.2 in *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 202, para. 2 of the commentary, and in that to draft guideline 2.3.1 in ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489, para. 23 of the commentary. See also the eighth and ninth Reports on reservations to treaties, A/CN.4/535/Add.1, para. 101 and A/CN.4/544, para. 27, respectively.

[388] Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (note 15) (chap. XI.A.6).

[389] See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (notes 15, 16 and 19) (chap. XI.A.6).

under article 21, paragraph 1 (b), of the Vienna Conventions.[390] A Yugoslav declaration concerning a reservation by the Soviet Union was similar,[391] but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.[392] That being said, and even if the American and Yugoslav declarations had been made out of a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the 1954 Convention, the fact remains that they indisputably constitute express acceptances. The same is true in the case of the American declarations regarding the reservations raised by Romania and the Soviet Union with relation to the 1949 Convention on Road Traffic[393] which are virtually identical to those of the United States concerning the Convention concerning Customs Facilities for Touring, despite the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.[394]

231. In the absence of a very developed practice in the area of express acceptances, one is forced to rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

232. Article 23, paragraph 1, of the 1986 Vienna Convention states that:

> A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

The *travaux préparatoires* for this provision were analysed in connection with draft guidelines 2.1.1 and 2.1.5;[395] that analysis was summarized in the commentaries to those drafts.[396] It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance was touched upon only incidentally.

---

[390] On the question of reciprocity of reservations, see D. Müller, commentary to article 21 (1969), footnote 317 above, pp. 901-907, paras. 30-38.

[391] See *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 595 (note 19) (chap. XI.A.6).

[392] Article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring in fact provides that "No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies", and that "Any State availing itself of this right shall notify the Secretary-General accordingly".

[393] *Multilateral Treaties* ..., footnote 384 above, vol. I, p. 638 (note 17) (chap. XI.B.1). The Statements by Greece and the Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to specifying that the two Governments "do not consider themselves bound, with regard to the Soviet Union, by the provisions to which the reservation had been raised" (ibid.). Nevertheless, an acceptance could produce the same effect as a simple objection.

[394] Article 54, paragraph 1, of the 1949 Convention simply provides for the reciprocity of a reservation concerning article 52 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

[395] Sixth report on reservations to treaties, addendum (A/CN.4/518/Add.1), paras. 40-47.

[396] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 64-66, paras. (2) to (7) of the commentary to draft guideline 2.1.1 and pp. 81-85, paras. (5) to (11) of the commentary to draft guideline 2.1.5; as well as pp. 94-95 , paras. (3) and (4) of the commentary to draft guideline 2.1.6. See also paras. 87-91 above.

233. As with objections,[397] this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it therefore suffices, in the framework of the Guide to Practice, to take note of this convergence of procedures and to stipulate, for the sake of clarity, the written form that an express acceptance takes by definition[398] in a specific draft guideline.

234. The following draft guidelines would appear to be sufficient for this purpose:

2.8.4 Written form of express acceptances

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptances

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

235. Draft guideline 2.8.5 is, in a sense, the counterpart of draft guideline 2.6.9 on objection procedure, and is based on the same rationale.[399] It clearly derives from the work of the International Law Commission, which resulted in the wording of article 23 of the Vienna Convention to the effect that reservations, express acceptances and objections are all subject to the same rules of notification and communication.[400]

236. Draft guideline 2.8.4 can in no way be considered superfluous. The simple fact that an acceptance is express does not necessarily mean that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, upon whose wording draft guideline 2.8.4 is based, but also by the importance of acceptances to the legal regime, validity and effects of reservations to treaties. Although the various proposals of the Special Rapporteurs on treaty law never insist, in so many words, that express acceptances must be in writing, it can be seen from their work that they have always leaned towards the maintenance of a certain formality. Sir Humphrey's proposals and drafts thus require that express acceptances be made within the instrument, or by any other appropriate formal procedure, when a treaty is ratified or approved by the State concerned, or, in other cases, by formal notification;[401] this would require a written version in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations,[402] express acceptances and objections, the Commission

[397] See paras. 87-91 above.

[398] See para. 195 above, draft guideline 2.8, second paragraph.

[399] See paras. 87-94 above.

[400] See in particular the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, p. 73, and ibid., vol. I, 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56. See also *Yearbook ... 1966*, vol. II, p. 276, para. (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see A. Pellet and W. Schabas, Commentary to article 23 (1969), *Les Conventions de Vienne ...*, footnote 317 above, p. 974, para. 5.

[401] See draft article 18, para. 2 (a) (iii) and (iv), in A/CN.4/144, footnote 144 above, p. 69; and draft article 20, paragraph 3, A/CN.4/177, footnote 331 above, p. 53, para. 13. See also draft article 19, para. 2, adopted by the Commission on first reading in 1962 (*Yearbook ... 1962*, vol. II, p. 176).

[402] See A. Pellet and W. Schabas, Commentary to article 23 (1969), *Les Conventions de Vienne ...*, footnote 317 above, p. 974, para. 5.

decided to include the issue of written form in paragraph 1 of draft article 20 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations,[403] objections and express acceptances did not come up for discussion in the Commission[404] or at the Vienna Conference.[405]

237. Even though the practice of States with regard to the confirmation of express acceptances made prior to the confirmation of reservations is, in the view of the Special Rapporteur, non-existent, article 23, paragraph 3, of the Vienna Conventions[406] states clearly that:

> An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

238. As has already been noted with regard to the confirmation of objections,[407] common sense would indicate that express acceptances, which are clearly on an equal footing with objections in this regard, should be treated in the same way. One need only reproduce the provision of the Vienna Conventions in the Guide to Practice:

> **2.8.6 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation**
>
> An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

239. On the other hand, it would seem inappropriate to include in the Guide to Practice a draft guideline that would amount, with regard to the express acceptance of reservations, to a counterpart of draft guideline 2.6.12 on "Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by the treaty":[408] not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of paragraph 5 of article 20, which allows the formulation of acceptances only by contracting States or international organizations,[409] but also, in practice, it is difficult to imagine a State or international organization actually proceeding to such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of "preventive objections": the "warning" made in advance to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

---

[403] See para. 235 above.

[404] See *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 261-262, paras. 72-93, and 816th meeting, 2 July 1965, p. 284, paras. 54-55.

[405] See the report of the Committee of the Whole, A/CONF.39/14, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 138-139, paras. 190-196.

[406] For the *travaux préparatoires* for this provision, see para. 113 above.

[407] See above, para. 114.

[408] See above, para. 124.

[409] See above, para. 196.

3. Acceptance of reservations to the constituent instrument of an international organization

240. Under article 20, paragraph 3, of the Vienna Conventions, worded identically:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

241. This provision originated in the first report of Sir Humphrey Waldock, who proposed a draft article 18, paragraph 4 (c), which reads as follows:

> In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument and to constitute the reserving State a party to the instrument.[410]

The same idea is taken up in the fourth report of the Special Rapporteur, but the wording of draft article 19, paragraph 3, is simpler and more concise:

> Subject to article 3 (bis) [originally the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.[411]

242. The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna Conference, in particular by the Soviet Union, which said that:

> Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations.[412]

243. Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the Vienna Convention of 1969. That provision in effect makes the 1969 Vienna Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or

---

[410] A/CN.4/144, footnote 330 above, p. 61. See also draft article 20, paragraph 4, adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. 25 of the commentary to draft article 20).

[411] A/CN.4/177, footnote 331 above, p. 54.

[412] *Summary records* (A/CONF.39/11), footnote 344 above, 21st meeting, 10 April 1968, p. 107, para. 6.

the assessment of reservations that may arise.[413] Nevertheless, the provision was adopted by the Vienna Conference.

244. The *travaux préparatoires* of the 1986 Vienna Convention also clearly indicate that article 5 of the Convention and paragraph 3 of article 20 are neither mutually exclusive nor redundant. In effect, paragraph 3 of article 20 was only inserted into the 1986 Convention because the Commission finally decided, after much hesitation, to adopt a provision corresponding to article 5 of the 1969 Vienna Convention.[414]

245. On its own terms, recourse to the organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations are not subject to the flexible system.[415] Their main objective consists in the establishment of a new juridical person, in the framework of which the diversity of bilateral relations between States or organizations members is largely inconceivable. There cannot be numerous types of "membership", nor even less can there be numerous decision-making procedures. The usefulness of the principle is particularly obvious where a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States having made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.[416] A solution of this sort, creating a hierarchy among or a bilateralization of the membership of the organization, would paralyse the work of the international organization in question and would thus be inadmissible. The Commission, basing itself largely on the practice of the Secretary-General in the matter, therefore rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading, that

> in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.[417]

---

[413] See the Swiss amendment (A/CONF.39/C.1/L.97, *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 135) and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113, ibid.). See also interventions by France (*Summary Records* (A/CONF.39/11), footnote 344 above, 22nd meeting, 11 April 1968, p. 116, para. 16); by Switzerland (ibid., 21st meeting, 10 April 1968, p. 111, para. 40), by Tunisia (ibid., para. 45), and by Italy (ibid., 22nd meeting, 11 April 1968, p. 120, para. 77). Similarly, see P.-H. Imbert, footnote 325 above, p. 122; M. H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, 1971, p. 151.

[414] *Yearbook ... 1982*, vol. II, Part 2, p. 36, para. 3 of the commentary to draft article 20. See also debates within the Commission, *Yearbook ... 1982*, vol. I, 1727th meeting, 15 June 1982, pp. 177-178.

[415] M. H. Mendelson has demonstrated that "[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members" (M. H. Mendelson, footnote 413 above, p. 148).

[416] See D. Müller, footnote 317 above, p. 854, para. 106; M. H. Mendelson, footnote 413 above, pp. 149 and 150-151.

[417] *Yearbook ... 1962*, vol. II, p. 181, para. 25 of the commentary to draft article 20.

246. Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

247. This principle is confirmed, moreover, by the practice followed in the matter. Despite some indecision with regard to the practice of depositaries other than the Secretary-General of the United Nations,[418] the latter clearly set out his position in the case of the Indian reservation to the Convention of the Inter-Governmental Maritime Consultative Organization (IMCO).[419] On that occasion, it was specified that the Secretary-General "has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[420] Unfortunately, there are very few examples of acceptances by the competent organ of the organization concerned in the collection of *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. It is nonetheless worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank as amended in 1979 were expressly accepted by the Bank.[421] Similarly, the French reservation to the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute's Governing Council.[422] Chile's instrument of ratification of the 1983 Statute of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in respect of that instrument were accepted by the Centre's Board of Governors.[423]

248. There is no question that, in keeping with the Commission's practice, article 20, paragraph 3, of the Vienna Conventions should be reproduced in draft guideline 2.8.7 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations:

---

[418] Thus, the United States always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by M. H. Mendelson, "Reservations to the Constitutions of International Organizations", footnote 413 above, p. 149, and pp. 158-160, and P.-H. Imbert, footnote 325 above, pp. 122-123 (note 186)), while the United Kingdom embraced the Secretary-General's practice of referring the question back to the competent organ of the organization concerned (ibid., p. 121).

[419] See M. H. Mendelson, "Reservations to the Constitutions of International Organ", footnote 413 above, pp. 162-169, and P.-H. Imbert, footnote 325 above, pp. 123-125.

[420] See document A/4235, para. 21. See also *Yearbook ... 1965*, vol. II, p. 102, para. 22, and *Summary of Practice ...*, footnote 358 above, p. 59, paras. 197 and 198.

[421] *Multilateral Treaties ...*, vol. I, p. 543, notes 7 and 9 (chap. X, sect. 2.b).

[422] Ibid., vol. II, p. 407, note 4 (chap. XXV, sect. 3).

[423] Ibid., p. 73, note 5 (chap. XIV, sect. 7).

2.8.7 Acceptance of reservations to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

249. The provision in the Vienna Conventions, however, is barely more than a "safeguard clause"[424] that excludes the case of constituent instruments of international organizations, including the principle of tacit acceptance,[425] from the scope of the flexible system, while specifying that acceptance by the competent organ is necessary to "establish" the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. As the Special Rapporteur already indicated in his first report, "article 20, paragraph 3, is far from resolving all the problems which can and do arise" with regard to the legal regime applicable to reservations to constituent instruments.[426] That leaves a number of questions unanswered: What is a constituent instrument of an organization? Which organ is competent to decide on whether to accept a reservation? What effect does acceptance by the competent organ have on the individual reactions of member States and international organizations?

250. Before attempting to reply to these various questions — to which an answer is not to be found in the Vienna Conventions — it should be specified that the acceptance expressed by the competent organ of an international organization with regard to a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the assumption that a reservation is accepted at the end of a 12-month period can apply only to the cases described in paragraphs 2 and 4 of that article. Thus, the case set out in article 20, paragraph 3, is excluded — which amounts to saying that, unless otherwise provided in the treaty (in this case, the constituent instrument of the organization), acceptance must necessarily be express.

251. In practice, even leaving aside the problem of the 12-month period required under article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect, in certain organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,[427] the absence of any position by the competent organ of the organization concerned would be quite inconceivable. In any case, an organ of the organization must take a position on the admission of a new member at one point or another; without such a decision, the State cannot be considered a member of the organization. Even if the State in question is not going to be admitted by a formal instrument of the organization but rather will simply adhere to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires the competent organ to rule on the question. It is possible, however, to imagine cases in which the organ implicitly accepts the reservation and allows the candidate country

---

[424] D. Müller, footnote 317 above, p. 858, para. 114.

[425] Article 20, paragraph 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paragraphs 2 and 4 of article 20.

[426] A/CN.4/470, para. 137.

[427] One example is the case of the General Assembly of the World Tourism Organization (WTO) which, under article 10 of its Statutes, meets every two years.

to participate in the work of the organization without formally ruling on the reservation.[428]

252. It would therefore seem useful to reiterate in a separate guideline that the presumption of acceptance does not apply to constituent instruments of international organizations, at least with regard to acceptance expressed by the competent organ of the organization:

2.8.8 Lack of presumption of acceptance of a reservation to a constituent instrument

For the purposes of applying guideline 2.8.7, acceptance by the competent organ of the organization shall not be presumed. Guideline 2.8.1 is not applicable.

253. The fact remains that neither the Vienna Conventions nor the *travaux préparatoires*[429] shed any light on what is to be understood by the term "constituent instrument of an international organization".

254. An international treaty whose sole object is to establish a new international organization and does no more than specify and determine strictly constitutional aspects of the new subject of law, as well as its structure and organization, unquestionably falls within the scope of article 20, paragraph 3, of the Vienna Conventions. Such a treaty constituting the "constituent instrument" of an international organization *stricto sensu* is very rare[430] and an exception to the rule.

255. The vast majority of treaties establishing international organizations actually do combine rules relating to the organization, structure and functioning of the organization, on the one hand, with material rules establishing specific obligations for the organization and/or its member States, on the other hand. Hence, the Charter of the United Nations contains provisions concerning the functioning, structure and procedures of the Organization on the one hand and material rules applicable to all States Members of the Organization, on the other hand — for example, Articles 1 and 2. This combination of provisions is even more striking in the United Nations Convention on the Law of the Sea[431] or the 1944 Convention on International Civil

---

[428] See the example of the reservation formulated by Turkey to the IMCO Convention. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the Turkish delegation to participate in its work. This implied acceptance of the instrument of ratification and the reservation (William W. Bishop, "Reservations to Treaties", R.C.A.D.I., vol. 103, 1961-II, pp. 297-298; M. H. Mendelson, footnote 413 above, p. 163). Technically, this is not, however, a "tacit" acceptance as M. H. Mendelson seems to think (ibid.), but rather an "implicit" acceptance (see para. 189 above on the distinction).

[429] Neither the commentary on draft article 4 (*Yearbook ... 1966*, vol. II, p. 191), nor that on draft article 17, paragraph 3 (*Yearbook ... 1966*, vol. II, p. 207, para. 20), of the Commission contains a definition of the concept "constituent instrument of an international organization".

[430] See constituent instruments of the United Nations Educational, Scientific and Cultural Organization (UNESCO) (London, 16 November 1945), the Food and Agriculture Organization of the United Nations (FAO) (Quebec, 16 October 1945) and the constitutions of the Universal Postal Union (UPU) (Vienna, 10 July 1964) or the International Telecommunication Union (ITU) (Geneva, 22 December 1992).

[431] The problem of reservations does not arise, however, in the context of this Convention, owing to its article 309: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention". See also A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit, Mélanges offers à Laurent Lucchini et Jean-Pierre Quéneudec* (Pedone, Paris, 2003), pp. 501-520.

Aviation (establishing the International Civil Aviation Organization (ICAO)), which established international organizations and, at the same time, contain many material provisions. The same problem arises for treaties which, while setting out material obligations for the States parties, establish oversight and implementing organs, particularly in the case of commodities conventions.[432]

256. The *ratio legis* of article 20, paragraph 3, of the Vienna Conventions, which avoids paralysing the functioning of the international organization, is not transposable as such to all the provisions of such a hybrid treaty. M. H. Mendelson thus proposes distinguishing between "'organizational' provisions" (provisions concerning the organization and structure [of the organization]) and "'substantive' ones".[433] While the former, which are strictly constitutional in nature, would thus be subject to the regime laid down in article 20, paragraph 3, of the Vienna Conventions, the latter exist or could exist independently of the constituent instrument and "would have a legal content even if the Organization did not exist";[434] consequently, according to the author, these material provisions should not be subject to the more restrictive regime laid down in article 20, paragraph 3, of the Vienna Conventions, unless the treaty in question provides otherwise.

257. In concrete terms, however, the distinction between the strictly constitutional provisions and the material provisions is not easy and, in the absence of any practice, it would be rash to advance a criterion that would make it possible to distinguish between the two. Furthermore, it is debatable whether a distinction should be made among the various provisions of the constituent instruments when article 20, paragraph 3, is referring only to the treaty itself. Hence, it is the view of the Special Rapporteur that there is no value in introducing a guideline that attempts to define the concept of "constituent instrument" of an international organization, and that it would make more sense to do no more than set out the difficulties of defining the concept in the commentary on draft guideline 2.8.7 or 2.8.8.

258. Nor is an answer to be found in either the *travaux préparatoires* or the Vienna Conventions themselves on the organ competent to decide on acceptance of the reservation. This is easily explained: it is impossible to determine in a general and abstract way the organ of an international organization that is competent to decide on the acceptance of a reservation. This question is covered by article 5 of the Vienna Conventions, which deals with the application of the provisions of the Conventions to constituent instruments of international organizations "without prejudice to any relevant rules of the organization". Thus, the rules of the organization determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. Generally, and given the circumstances in which the reservation can be formulated, it can be assumed that "competent organ" means the organ that decides on the reserving State's application for admission or, in the absence of a formal admissions procedure, the organ competent to interpret the constituent instrument of the organization. Thus, the Indian "reservation" to the IMCO Constitution — once the controversy over the

[432] These categories of constituent instruments were enumerated by S. Rosenne during the discussion of draft article 19, paragraph 3, from which the current article 20, paragraph 3, derives. *Yearbook of the International Law Commission*, 1965, vol. I, 798th meeting, 9 June 1965, p. 159, para. 44.

[433] M. H. Mendelson, footnote 413 above, p. 146.

[434] Ibid.

procedure to be followed[435] was over — was accepted by the IMCO Council under article 27 of the Convention[436] while the Turkish reservation to this Convention was (implicitly) accepted by the Assembly.[437] With regard to the American reservation to the Constitution of the World Health Organization (WHO), the Secretary-General addressed the WHO Assembly, which was, by virtue of article 75 of the Constitution, competent to decide on any disputes with regard to the interpretation of that instrument. In the end, the WHO Assembly unanimously accepted the American reservation.[438]

259. An indication in the Guide to Practice of how "competent organ" of the organization is to be understood for the purposes of applying article 20, paragraph 3, of the Vienna Conventions — the text of which should be reproduced in draft guideline 2.8.7 — would be helpful:

2.8.9 Organ competent to accept a reservation to a constituent instrument

The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument.

260. A particular problem arises, moreover, in cases where the competent organ of the organization does not yet exist because the treaty has not yet entered into force or the organization has not yet been established. Who, in this case, should be deciding on the acceptability of the reservation?

261. This situation occurred with respect to the Convention establishing the International Maritime Organization (IMO)[439] — at the time still IMCO — to which some States had entered reservations or declarations in their instrument of ratification[440] or even the Constitution of the International Refugee Organization which the United States, France and Guatemala intended to ratify with reservations[441] before the respective constituent instruments of these two organizations had even entered into force. The Secretary-General of the United Nations, in his capacity as depositary of these Conventions and unable to submit the question of declarations and/or reservations to the organization (as it did not yet exist), decided to consult the States most immediately concerned, in other words, the States that were already parties to the Convention and, if there was no objection,

[435] See footnote 419 above.

[436] Under this provision, the Council assumes the functions of the organization if the Assembly does not meet.

[437] See para. 251 and footnote 428 above.

[438] On this case, see, in particular, M. H. Mendelson, footnote 413, pp. 161-162. For other examples, see para. 247 above.

[439] United Nations, *Treaty Series*, vol. 289, p. 3.

[440] See, in particular, the declarations of Switzerland, the United States, Mexico and Ecuador (*Multilateral Treaties* ..., footnote 384 above, vol. II, pp. 5-7 (chap. XII, sect. 2).

[441] These declarations are cited in P.-H. Imbert, footnote 325 above, p. 40 (footnote 6).

to consider the reserving States as members of the organization.[442]

262. Moreover, it should be noted that while article 20, paragraph 3, of the Vienna Conventions excludes the application of the "flexible" system for reservations to a constituent instrument of an international organization, it also prohibits a decision by the traditional system of unanimity. The Secretary-General's practice, however — which is to consult all the States that are already parties to the constituent instrument — is leaning in this direction. Had it been adopted, an Austrian amendment to this provision, submitted at the Vienna Conference, would have led to another solution:

> When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation.[443]

This approach, which was not followed by the Drafting Committee at the time of the Conference,[444] was upheld by M. H. Mendelson, who believes, moreover, that "[t]he fact that [...] the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization's control over reservations".[445]

263. The organization's control over the question of reservations is certainly an advantage of the solution advocated by the Austrian amendment. Nonetheless, the undeniable disadvantage of this proposal is that it leaves the reserving State in an undetermined status with respect to the organization, which can be very prolonged, until such time as the treaty enters into force. Thus, one might well wonder whether the practice of the Secretary-General is more reasonable. Indeed, asking States that are already parties to the constituent instrument to evaluate the reservation with a view to obtaining unanimous acceptance (no protest or objection) places the reserving State in a much more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization as

---

[442] M. H. Mendelson, footnote 413 above, pp. 162-163. In this same spirit, the United States, during the Vienna Conference, proposed replacing article 20, paragraph 3, with the following text: "When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force, and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides." (See *Summary records* (A/CONF.39/C.1/L.3, footnote 344 above, A/CONF.39/11, 24th meeting, 16 April 1968, pp. 130-131, para. 54)). This amendment, which was not adopted, would have considerably enlarged the circle of States that might have made their views on this known.

[443] A/CONF.39/C.1/L.3, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, p. 135. A Chinese amendment was very much along these lines, but could have meant that the reserving State becomes a party to the instrument even so. It provided that "When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted." (A/CONF.39/C.1/L.162, ibid., p. 135).

[444] M. H. Mendelson, footnote 413 above, pp. 152-153. See *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 137-138 and 240.

[445] Ibid., p. 153.

such is much more rapidly determined.[446] What is more, it should be kept in mind that the organization's consent is nothing more than the sum total of acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, be a disadvantage to the reserving State, since in most cases — at least, when it comes to international organizations with a global mandate — a decision will probably be taken by majority vote. Nonetheless, if there is no unanimity among the Contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

264. Both solutions seem to have an identical result. The difference, however — and it is substantial — is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. This is a major advantage for legal certainty. In absolute terms, it seems desirable, however, that during the negotiations, States or international organizations come to an agreement with a view to finding a modus vivendi for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject the reservations to the interim committee responsible for setting up the new international organization.[447]

265. It therefore seems useful to clarify this point in article 20, paragraph 3, of the Vienna Conventions in a guideline 2.8.10 which might read as follows:

> **2.8.10 Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established**
>
> In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation requires the acceptance of all the States and international organizations concerned. Guideline 2.8.1 remains applicable.

266. Lastly, the influence of article 20, paragraph 3, of the Vienna Conventions on the right or power of other States to make individual observations, or accept or reject a reservation to the constituent instrument of an international organization must still be examined. In other words, does the competence of the organ of the organization to decide on whether to accept such a reservation preclude individual

---

[446] The example of the Argentine reservation to the constituent instrument of the International Atomic Energy Agency (IAEA) shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary. The Argentine instrument was accepted after a period of only three months. See M. H. Mendelson, footnote 413 above, p. 160.

[447] This solution was envisaged by the Secretary-General of the United Nations in a document prepared for the Third United Nations Conference on the Law of the Sea. In this report, the Secretary-General stated that "before entry into force of the convention on the law of the sea, it would of course be possible to consult a preparatory commission or some organ of the United Nations" (A/CONF.62/L.13, *Official Records of the United Nations Conference on the Law of Treaties (third session)*, vol. VI, p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the "organ qualified to accept a reservation", see the second paragraph of draft guideline 2.1.5 (Communication of reservations) and its commentary (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 91-92, paras. 28 and 29 of the commentary).

reactions by other members of the organization? The question may seem odd. Why allow States to express their individual views if they are supposedly making a collective decision on acceptance of the reservation within the competent organ of the organization? Would it not give the green light to reopen the debate on the reservation, particularly for States that were not able to "impose" their point of view within the competent organ, and thereby to imagine a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes had different outcomes?

267. During the Vienna Conference, the United States introduced an amendment to article 17, paragraph 3 (which became paragraph 3 of article 20), specifying that "such acceptance shall not preclude any Contracting State from objecting to the reservation".[448] Adopted by a slim majority at the 25th meeting of the Committee of the Whole[449] and incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole "on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law.[450] It became apparent in the work of the Drafting Committee that the formulation of the American amendment was not very clear and left open the question of the legal effects of such an objection.[451]

268. In actual fact, it is hard to understand why member States or international organizations cannot take individual positions on a reservation outside the framework of the international organization and communicate their views to interested parties, including to the organization. In all likelihood, these positions will probably have no particular legal effect; however, this is not an isolated case and the absence of a legal effect *stricto sensu* of such declarations does not rob them of their importance[452] — they provide an opportunity for the reserving State, in the first instance, and, afterward, for other interested States, to become aware of and evaluate the position of the State author of the unilaterally formulated acceptance or objection which, in the end, will doubtless be a useful contribution to the discussions within the competent organ of the organization. They might also form the basis for launching a "reserving dialogue" among the key players, or they could be taken into consideration, where appropriate, by a third party who might have to decide on the validity or scope of the reservation.

269. In view of these considerations, the Special Rapporteur believes that it would be useful to include in the Guide to Practice a draft guideline stating that the right of member States or international organizations of the organization to give an individual opinion on a reservation to a constituent instrument shall not be affected

---

[448] A/CONF.39/C.1/L.127, *Documents of the Conference* (A/CONF.39/11/Add.2), p. 135, para. 179.iv.d.

[449] By 33 to 22, with 29 abstentions. *Summary records* (A/CONF.39/11), footnote 344 above, 25th meeting, 16 April 1968, p. 135, para. 32.

[450] *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 335 above, pp. 137-138, para. 186.

[451] *Summary records* (A/CONF.39/11), footnote 344 above, 72nd meeting, 15 May 1968, pp. 425-426, paras. 4-14.

[452] See also para. 138 above on "preventive objections".

by the competence of the organ of the international organization to decide on acceptance of the reservation. Such a guideline is in no way contrary to the Vienna Conventions, which take no position on this matter.

270. In this spirit, draft guideline 2.8.11 could be rewritten as follows:

2.8.11 Right of members of an international organization to accept a reservation to a constituent instrument

Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

4. Irreversibility of acceptances of reservations

271. Unlike their treatment of objections,[453] neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

272. The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated after the end of the 12-month time period stipulated in this provision (or of any other time period specified by the treaty in question): to allow a "regret" that would call into question the treaty relations between the States or international organizations concerned[454] to be expressed several years after the intervention of an acceptance that came about because a contracting State or an international organization remained silent on one of the "critical dates", would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation entered after the end of the 12-month time period (or of any other time period specified by the treaty in question), their late "objections" can no longer have the usual effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.[455] A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.[456]

273. There is no reason to approach express acceptances any differently. Without there being any need for an in-depth analysis of the effects of an express acceptance — which are no different from those of a tacit acceptance,[457] suffice it to say that, like tacit acceptances, the effect of such an acceptance would in theory be the entry into force of the treaty between the State or international organization author of the reservation and the State or international organization that has accepted it and even, in certain circumstances, between all States or international organizations that are parties to the treaty. It goes without saying that calling the

---

[453] On the question of the withdrawal and amendment of objections to reservations, see paras. 145-180 above.

[454] See paras. 139-141 above.

[455] See draft guideline 2.6.15 (Late objections), para. 143 above.

[456] See para. 179 above, and draft guideline 2.7.9 (Prohibition against the widening of the scope of an objection to a reservation).

[457] The question of the effects of the acceptance of a reservation will be more fully developed in a subsequent report of the Special Rapporteur.

legal consequences into question a posteriori would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is just as true, moreover, in the case where acceptance has been made expressly: even if there is absolutely no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more apparent when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.[458]

274. The dialectical relationship between the objection and the acceptance, introduced and affirmed by article 20, paragraph 5, of the Vienna Conventions,[459] and the framework for the objection mechanisms — which is aimed at stabilizing troubled treaty relations, in some sense, through the reservation — necessarily imply that acceptance (whether it is tacit or express) is final.

275. Thus, the Guide to Practice should include a draft guideline stressing the final and irreversible nature of acceptances:

2.8.12 Final and irreversible nature of acceptances of reservations

Acceptance of a reservation made expressly or tacitly is final and irreversible. It cannot be subsequently withdrawn or amended.

---

[458] See also, mutatis mutandis, the first of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 367, para. 176).

[459] See D. Müller, footnote 317 above, para. 49, pp. 822-823; see also para. 207 above.